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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1971

No. 70-191

THOMAS RAY SANDELL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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INDEX

	Page
Clarification of Statement	1-2
Argument	2-5
Conclusion	5-7
Certificate of Service	7

CITATIONS

Cases:	Page
Simmons V. United States (1968) 390 U.S. 377 19 L. Ed. 1247, 88 S. Ct. 967	3
United States V. Wade 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926(1967)	6

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Petitioner, pursuant to Rule 24(4) of the rules of this court, files this Reply Brief addressed to arguments raised in the brief of the government.

CLARIFICATION OF STATEMENT

The statement contained in the government's brief is in some respects argumentative rather than factual. It is true, as stated by the government, that the record may support a conviction for receiving stolen property (see government's brief, page 3); however, petitioner was not charged with such a crime. In the record there is nothing to show that petitioner was told why the false

identification papers were wanted, but merely that he sold the false identification for a money order machine. While it is true that Mr. Donald Hill did identify petitioner, a very material fact is that he first identified one of the others indicted by the same indictment, Count Five, which was dismissed after Mr. Hill's in-court identification of petitioner on the second day of trial.

ARGUMENT

The government attempts in its brief to show that the in-court identification of petitioner by Miss Chesser, a teller in a savings and loan association, was either proper or, if improper, was harmless since he was convicted on another count anyway. This is a fallacious argument. This identification was crucial to the government's case against petitioner. The government further states that the detective who first interviewed the witness showed her a photograph of Gregory (the man who was probably the one who actually cashed the money order petitioner is accused of cashing) but the exhibit (government's 9) shows that he did not show her a picture of that Joseph Gregory. Government's exhibit 8-A shows what Gregory looked like at the time in question (R469-471). This was not the same Joseph Gregory depicted in Government Exhibit 9 (Ex. 9-A). The argument is therefore a misleading argument.

The fact remains that the witness had the impression obtained from the first photographic identification so

fixed in her mind--even though she denied making such an identification--that she identified (mistakenly) petitioner at trial. See Simmons V. United States, 390 U.S. 337, 19 L. Ed. 2d 1247, 88 S. Ct. 967(1968).

The government also argues that Gregory denied cashing the money order in question. This is only a half truth. He did at first, on direct examination, say he did not cash a money order at First Federal in West Palm Beach, but later, on cross examination, he testified that: he was under the influence of narcotics (R 486); his false identification was in the name of Clifton J. Carlin (R 494); the signature endorsement (Clifton J. Carlin) on the money order in question is his (R 500, 530); he does not know how many money orders he cashed (R 504); he does not know where he cashed all of the money orders (R 504, 530-531); he was alone when he cashed one at a bank he just happened to be passing by (R 445); and he was with the defendant Seader when he cashed another (R 531). It is petitioner's belief that the one Gregory cashed at a bank he "happened to be going by" was cashed at First Federal and is the one he (Gregory) said he endorsed. This seems to be a classic case of mistaken eye-witness identification. No authority need be cited that this is very often unreliable.

The government also belittles petitioner's contention that Mr. Hill's identification was in error, by indicating that since petitioner was living with Miss Neal it makes no difference that

petitioner was not charged as being the person involved in cashing the money order at Mr. Hill's place of business. This would appear to be an argument to the effect that since he was living with a woman other than his wife he must be guilty of something. The money order involved with Mr. Hill was No. AT 737-052-618. This was the money order involved in Count V of the indictment. Petitioner was not charged in this Count, therefore he had no reason to even attempt to prepare a defense to a charge of having anything to do with cashing this particular money order. He was, in effect, tried for something he was not charged with and as a matter of fact another person stood accused of this until after petitioner had been improperly identified (R 412). This was like leading petitioner into a trap unaware that Count V really was intended to apply to him. If petitioner was to be tried for the act described in Count V, he should have been indicted for it. This provision of the Fifth Amendment is absolute--it says that no person shall be held to answer for an infamous crime unless indicted. There is no qualification, just a flat prohibition. Our system of justice is basicly fair and this is one of the constitutional provisions that helps to assure that it will always remain fair. The Sixth Amendment also provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature of the accusation. For some reason, which appears only inferentially in the record, the government used as a witness against petitioner a man who had previously identified a co-defendant as the person who

who drove a young lady to the witness's business establishment where the young lady gave the witness a money order as a deposit on a rental car. The co-defendant was indicted, together with the young lady for transporting the money order (a forged security) in interstate commerce (Indictment, Count Five). It seems clear that the government itself considered Mr. Hill as an unreliable witness. The improper lineup took place in October or November of 1968 (Tr. 419), the indictment was filed in 1969, but petitioner was not charged in the indictment.

The government also argues that Miss Neal admitted passing the fraudulent money order (government's brief, 7). She also told the court and jury who it was that drove her to Mr. Hill's place of business, and it was not petitioner (Tr. 727-728). It is asserted by the government that the identification at the jail by Mr. Hill was not a lineup identification, but the physical description of the events surrounding this identification fit a lineup even if the word is not used (Tr. 418; 419; 426; 428-430), and it took him forty-five minutes to an hour to make any identification (Tr. 428).

CONCLUSION

The fundamental nature of the guarantee of the Fifth Amendment that no person shall be held to answer for an infamous crime unless on a presentment or indictment by a grand jury, and of the guarantee of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy

the right to be informed of the nature and cause of the accusation were violated by the trial of petitioner on the charge of Count Five of the indictment. He was not charged in this Count, yet the government as a matter of actual fact tried him for it by having the witness Hill identify him before the jury as the person involved, and then dismissing this Count as it applied to the other defendant charged thereby. The facts surrounding the improper lineup identification and the apparent confusion of the witness all point up the necessity of safeguards as pronounced by United States V. Wade (1967) 388 U.S. 218; 18 L. Ed. 2d 1149; 87 S. Ct. 1926.

To compound this error the witness against petitioner regarding Count One (d) and Count Two was a witness with an obviously faulty memory who had viewed a recent mug shot of petitioner from a set of photographs containing two photographs of petitioner. She chose this emphasized person who was obviously in custody as the person who cashed a forged money order. She forgot about making this photographic identification, but about a week before the trial she was shown the same photographs and picked out the same one. She observed petitioner in the courtroom (but from the back). She then made an in-court identification. It is petitioner's belief that her memory of him was a memory gained from the impression or image of the first, and forgotten, photographic identification. Except for this mistaken in-court identification, all of the evidence at the trial indicated that another person who had been named in the same indictment

(Counts One and Four) had cashed the particular money order. Petitioner submits that the identification of him by this witness, tainted by impermissibly suggestive pretrial procedures, was error.

Petitioner submits that his conviction should be reversed and upon retrial the identification by Chesser and Hill should be excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Petitioner have been served upon: Solicitor General, Department of Justice, Washington, D.C. 20530 by Air Mail, postage prepaid, and one copy on United States Attorney, P. O. Box 1070, Miami, Florida, by first-class mail, postage prepaid, this 3rd day of September, 1971.

JOHN S. CALL, JR.

JOHN S. CALL, JR., Atty.